No. 92-728

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Supreme Court of the United States

October Term, 1992

TWIN CITY FIRE INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, HARTFORD CASUALTY INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, HARTFORD INSURANCE COMPANY OF THE MIDWEST, NEW ENGLAND INSURANCE COMPANY, AND HARTFORD INSURANCE COMPANY OF CONNECTICUT,

Petitioners,

v.

SAMUEL F. FORTUNATO, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF INSURANCE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a State, in the exercise of its exclusive regulatory oversight of the business of insurance, violate substantive due process or takings principles by requiring an insurance holding company that chooses to withdraw an affiliate from the State's troubled automobile insurance market to (1) assure that the affiliate continues fulfilling, pending its departure, its general obligations as a licensed insurer to write and renew such policies, and (2) surrender the licenses of its affiliates to write more lucrative business in the State, where such measures rationally serve the public interest in protecting drivers that have become dependent upon such coverage and in stabilizing the disruptive market consequences of insurer withdrawals?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal constitutional provisions and New Jersey statutes cited herein are, in pertinent part, as follows:

Fifth Amendment

> [N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

N.J. Stat. Ann. § 17:32-2(d)

> No [foreign insurance] company shall be admitted until it:
>
> d. Obtains from the commissioner a certificate that it has complied with all the requirements of this subtitle applicable to it, and is authorized to transact business in this State. This certificate shall expire on May 1 of the following year, and shall be renewed each year before May 1; provided, that the commissioner may refuse to issue or renew any such certificate of authority if, in his judgment, such refusal will best protect the interests of the people of this State or if the company fails to comply substantially with any requirement or limitation of this subtitle applicable to it or any rule or regulation promulgated by the commissioner thereunder which in the judgment of the commissioner is reasonably necessary to protect the interests of the people of this State, but the commissioner may not refuse to renew any such certificate except after notice and hearing[.]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED – Continued

N.J. STAT. ANN. § 17:33B-2(g)

The Legislature finds and declares that:

(g) To provide a healthy and competitive automobile insurance system in this State, automobile insurers are entitled to earn an adequate rate of return through the ratemaking process.

N.J. STAT. ANN. § 17:33B-30

An insurance company of another state or foreign country authorized under chapter 32 of Title 17 of the Revised Statutes to transact insurance business in this State may surrender to the commissioner its certificate of authority and thereafter cease to transact insurance in this State, or discontinue the writing or renewal of one or more kinds of insurance specified in the certificate of authority, only after the submission of a plan which provides for an orderly withdrawal from the market and a minimization of the impact of the surrender or discontinuance takes effect. In reviewing a plan for withdrawal under this section, the commissioner shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered. The certificate of authority of the company shall be deemed to continue in effect until the provisions of the approved plan have been carried out. The provisions of this section shall apply to any request for withdrawal, surrender or discontinuance filed on or after January 25, 1990.

STATEMENT OF THE CASE

This case primarily involves distinctive aspects of New Jersey law, arising from the state's history in implementing its public policy of mandatory automobile insurance and its various statutory measures aimed at solving chronic problems in the exclusively state-regulated insurance industry.

A. Introduction

In an effort to redress a long-standing statewide automobile insurance crisis, the New Jersey Legislature enacted in 1990 a wide-ranging statute designed to reform underwriting practices, restore market stability, and raise revenues to satisfy a $3.3 billion deficit amassed by the State's residual facility for insuring higher-risk drivers. That statute, known as the "FAIR Act"[1], includes key withdrawal provisions that require licensed insurers seeking to cease writing policies in the State to first obtain approval from the State Insurance Commissioner of a "plan which provides for an orderly withdrawal from the market and a minimization of the impact . . . on the public generally and on the company's policyholders in this State." N.J. STAT. ANN. § 17:33B-30 (West 1992). Among other things, the 1990 statute obligates the Commissioner to consider requiring, as a condition of withdrawal, the surrender of some or all of the New Jersey licenses held by the departing carrier or by affiliated insurers within the same holding company system. *Ibid.* The FAIR Act also includes a variety of comprehensive, and largely controversial, measures to reform the State's insurance system on a massive scale.

Just a few days before the FAIR Act was adopted, the ITT Corporation[2] abruptly attempted in March 1990 to pull one of its corporate affiliates out of the State private passenger insurance market, thereby leaving many of that affiliate's over 16,000 customers – who are legally obligated under State law to have liability

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[1] The full name of the statute is the "Fair Automobile Insurance Reform Act", L. 1990, c. 8, N.J. STAT. ANN. § 17:33B-1, *et seq.* (West 1992) (effective March 12, 1990).

[2] ITT Corporation is the ultimate corporate parent of the petitioners in this case. See Petitioners' Statement Pursuant to Rule 29.1, Petition for Certiorari ("Pet.") at ii.

insurance[3] – without a ready means to obtain replacement coverage. Exercising his powers to act in the public interest, the Insurance Commissioner obtained a court injunction arresting petitioners' hasty and selective withdrawal, and thereafter administratively imposed substantial conditions on that withdrawal consistent with the new statute. Petitioners unsuccessfully resisted those conditions on various grounds in the state appellate courts, and now seek this Court's review by reasserting two constitutional arguments under the Due Process and Takings Clauses that were rejected below.

As demonstrated herein and in the detailed unanimous opinions of the state appellate courts, petitioners' exaggerated constitutional arguments challenging New Jersey's regulatory scheme raise no substantial issues that warrant this Court's review. Nor are there any conflicts among the federal circuit courts or state appellate courts that need the Court's resolution in this case.

B. The 1990 Reform Statute and Twin City's Hasty and Selective Attempt to Abandon Its Over 16,000 New Jersey Automobile Policyholders on the Eve of Its Passage

On March 12, 1990, the FAIR Act was signed into law. The FAIR Act is designed to fundamentally alter and stabilize the conduct of the business of automobile insurance in New Jersey. A major goal of the FAIR Act is to eliminate the State's previous residual market mechanism for insuring non-commercial drivers, the Automobile Full Insurance Underwriting Association (the "JUA"), and to adopt, after a two-year transition period, a new system of assigning to insurers persons who are unable to obtain such coverage in the voluntary market. N.J. STAT. ANN. § 17:33B-2(h) (West 1992). The FAIR Act also accelerated the schedule for the downsizing, or "depopulation", of the JUA (which at its zenith covered over 50% of the New Jersey market) in preparation for a new assigned risk plan, which would provide coverage to only 10% of the market starting October 1, 1992. N.J. STAT. ANN. § 17:30E-14; § 17:33B-11 (West 1992). Moreover, the

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[3] Since 1973 New Jersey has required automobile owners in the State to purchase liability and other specified coverages. *See* N.J. STAT. ANN. § 39:6A-1, *et seq.*

FAIR Act provided a means to pay the debts and obligations of the JUA by imposing taxes and fees for several years on insurance companies, doctors, lawyers, bad drivers and others.[4]

Section 72 of the FAIR Act (N.J. STAT. ANN. § 17:33B-30) sets forth the conditions pursuant to which "foreign"[5] insurers (insurers incorporated in other states or foreign countries, but licensed to do business in New Jersey) may withdraw from the New Jersey insurance market. Under Section 72, no withdrawal from the New Jersey insurance market can take place until an insurer submits a plan of orderly withdrawal for the Commissioner's review; obtains the Commissioner's

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[4] *See, e.g.*, N.J. STAT. ANN. § 17:33B-49 (West 1992) (surtaxes on automobile insurance premiums in 1990, 1991 and 1992); N.J. STAT. ANN. § 17:30A-8 (West 1992) (assessments on property-casualty insurers from 1990 through 1997). The facial constitutionality of the surtaxes and assessments imposed upon insurers under the statute was sustained by the New Jersey Supreme Court in *State Farm v. State*, 590 A.2d 191 (N.J. 1991), in a landmark opinion which, as the Court thereafter observed in this case, comprehensively traces and explains the history of New Jersey's regulatory efforts to combat the "intractable problem of providing coverage for high-risk drivers." *State Farm v. State*, *supra*, 590 A.2d at 191, quoted in *In the Matter of the "Plan for Orderly Withdrawal From New Jersey" of Twin City Fire Insurance Company*, 609 A.2d 1248, 1254 (N.J. 1992), *aff'g* 591 A.2d 1005 (N.J. App. Div. 1991) (hereinafter "*Twin City*"). Likewise, the annual fees imposed on attorneys, physicians, and other professionals under the FAIR Act have withstood constitutional scrutiny by New Jersey's appellate courts. *See N.J. Bar Association v. Berman*, 611 A.2d 119 (N.J. App. Div. 1992) (attorney tax); *Medical Society v. Florio*, Docket No. A-3519-90T2 (N.J. App. Div. 1992) (unpublished) (annual fees on physicians and other licensees). Finally, it should be noted that this Court has already declined review earlier this year of the State's efforts under the FAIR Act to depopulate the residual market by assigning risks to licensed insurers. *In re Matter of Assignment of Exposures to Aetna Casualty & Surety Co., Allstate Insurance Co. and Colonial Penn Insurance Co.*, 591 A.2d 631 (N.J. App. Div. 1991), certif. den. 599 A.2d 162 (N.J. 1991), *cert. denied*, 503 U.S. ___, 112 S.Ct. 1244 (1992).

[5] The FAIR Act also contains parallel provisions governing the orderly withdrawal of domestic insurers chartered in New Jersey, including the same "affiliate-surrender" and "new business" features objected to by petitioners here. See N.J. STAT. ANN. § 17:17-10(b) (West 1992).

approval; and implements the plan.[6] As noted, the Commissioner may approve an insurer's plan of orderly withdrawal if it provides for (1) the applicant's orderly withdrawal from the market; (2) a minimization of the impact of the surrender or discontinuance on the public generally; and (3) a minimization of the impact of the surrender or discontinuance on the company's policyholders in this State. N.J. STAT. ANN. § 17:33B-30 (West 1992). The company's status as a licensed insurer remains in effect until its withdrawal is complete. *Id.* Further, the statute prescribes that the Commissioner "shall consider, and may require as a condition of approval, whether some or all other certificates of authority issued pursuant to Chapter 17 or 32 of Title 17 of the Revised Statutes held by the company or by other companies in the same holding company as the company submitting the plan should be surrendered." *Id.*[7]

These statutory measures are thus designed to assure that an insurer wishing to leave New Jersey does so in a regulated, orderly manner that does not leave its policyholders in the lurch or the insurance market in disarray. The State Legislature has determined that it is in the public interest to direct the Insurance Commissioner, as part of that regulatory oversight, to consider whether each affiliate within an insurance holding company should surrender its license when a related insurer chooses to withdraw from the New Jersey market. By such means, the Commissioner can prevent

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[6] The Legislature, no doubt fearing an exodus of insurers out of the State while the FAIR Act was being deliberated, made the withdrawal provisions of the Act retroactive to January 25, 1990, the date the bill had first been introduced. *Ibid.*

[7] After responding to substantial industry comments, the Commissioner adopted final regulations, effective May 20, 1991, to implement the withdrawal statute, which include, *inter alia*, factors relevant to his determination of whether to waive the condition that affiliates surrender their certificates of authority. *See* 23 N.J. Register 1673 (May 20, 1991). Those regulations are included in Respondent's Appendix ("Resp.A."). *See* N.J. Admin. Code 11:2-29.3(c) (Resp.A-19). These factors include, for example, consideration of such matters as whether the withdrawal is due to "specified problems affecting the solvency of the applicant." N.J. Admin. Code 11:2-29.3(c)(4) (Resp.A-20). The regulations codified informal Department of Insurance guidelines and policies that predated the FAIR Act and parallel considerations cited in the Commissioner's August 14, 1990 Decision and Order regarding petitioners.

a holding company from selectively "dumping" its less remunerative automobile insurance affiliate – thereby forcing a large group of policyholders *en masse* to seek coverage with another insurer – while other affiliates within that holding company continue to reap the benefits of more lucrative lines of insurance.[8] The Legislature has also determined that, pending their withdrawal, licensed insurers must continue to share the same obligations as all other licensed carriers in the State.

As the unrefuted record[9] below reflects, petitioner Twin City Fire Insurance Company ("Twin City") is a property-casualty insurer incorporated in Indiana, licensed to transact business in each of the fifty states and the District of Columbia. A member of the ITT Hartford Group holding company system, Twin City is a wholly-owned subsidiary of Hartford Fire Insurance Company ("Hartford Fire"), as are the other six affiliates covered by the Administrative Order.[10] The ITT Corporation is the parent company of Hartford Fire and, indirectly through Hartford Fire, owns and controls 100% of Twin City and the other six affiliates. Twin City primarily writes in New Jersey private passenger and commercial automobile insurance.[11] Its sister ITT affiliate, Hartford

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[8] This legislative approach takes into account a corporate structure, commonly and advantageously employed in the industry, where several affiliated insurance companies operate under one holding company umbrella. See N.J. Stat. Ann. § 17:27A-1, *et seq.* (West 1992) (regulating holding companies of New Jersey insurers). The affiliate-surrender provision also recognizes the obvious business opportunities for "cross-sales" of an insurer's other lines when its agents sell State-mandated automobile coverage to customers.

[9] Twin City failed to accept the Commissioner's specific invitation to request an evidentiary hearing on any fact issues raised by the Commissioner's August 1990 administrative decision on its withdrawal. (Pet.A-97).

[10] The six affiliates include Hartford Accidental Indemnity Company, Hartford Casualty Insurance Company, Hartford Underwriters Insurance Company, Hartford Insurance Company of the Midwest, New England Insurance Company and Hartford Insurance Company of Connecticut. For sake of convenience, respondent shall at times collectively refer to the petitioners' holding company enterprise as "ITT Hartford," as did the State Supreme Court. 609 A.2d at 1252.

[11] As reflected in the Commissioner's 1990 administrative order, in 1989 Twin City insured 16,456 New Jersey private passenger automobile policyholders,

Underwriters Insurance Company ("Hartford Underwriters"), also writes personal automobile insurance in New Jersey, including policies generated through its valued nationwide endorsement from the American Association of Retired Persons ("AARP").

As the State Supreme Court observed, the record reveals many inter-relationships and synergies between Twin City and its affiliates that justify considering them a common enterprise for regulatory purposes. Specifically, Twin City and its affiliates market their products collectively under common trade names through common agents with general authority to bind member companies of ITT Hartford, process claims collectively through personnel of Hartford Fire, and participate with each other in reinsurance-pooling agreements. 609 A.2d at 1252. Indeed, as petitioners' counsel conceded before the State Supreme Court, the decision to withdraw Twin City's private automobile insurance lines from New Jersey would be dictated by ITT Hartford management. 609 A.2d at 1259.

Despite the loss projections presented by petitioners to this Court, the record in the State proceedings indicates that Twin City and its affiliates have enjoyed – and are assured under New Jersey law – the opportunity to earn a fair rate of return on their New Jersey automobile insurance business. Through at least 1989 Twin City reported healthy profits on its private passenger auto business, and since that time Twin City has availed itself annually of New Jersey's automatic

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business which earned it $16.7 million that year in annual premium revenues. (Pet.A-72). Twin City also wrote a sizable 13% of New Jersey's commercial automobile business in 1989, earning $49.6 million in premiums from those 10,975 commercial policies, which included a number of major national accounts of "Fortune 500" corporations. It is true that Twin City, standing alone, insured slightly more than 1% of New Jersey's private passenger voluntary auto insurance market in 1989. However, if one combines Twin City's personal automobile business with the private passenger "books" of Hartford Underwriters and Twin City's other affiliates, the ITT Hartford insurers collectively ranked in the top 20 largest of the more than 100 insurance companies writing private passenger auto business in the State.

"flex rate" increases tied to consumer price indices.[12] Most significantly, Twin City *refrained* from seeking from the State any "prior approval" rate increases for its personal automobile lines from *August 1988* through the date of the State Supreme Court's decision,[13] despite the fact that state law specifically guarantees automobile insurers the right "to earn an adequate rate of return through the ratemaking process." N.J. STAT. ANN. § 17:33B-2(g) (West 1992). *See also State Farm v. State*, *supra* n.4, 590 A.2d at 206-207 (sustaining FAIR Act's facial validity under Takings and Due Process Clauses, given the Act's express recognition of insurers' rights to earn fair returns). In addition, the administrative decision below noted that Twin City's other lines of insurance "have historically been very profitable." (Pet.A-82, A-85).

As the Legislature anticipated, the passage of the FAIR Act prompted a veritable stampede[14] of insurers seeking to withdraw from automobile insurance lines in New Jersey. On March 7, 1990, in expectation of the Governor's imminent signing of the FAIR Act into law, Twin City hurriedly attempted to surrender its certificate of authority to the Department of Insurance without filing a withdrawal plan. Despite the Department's refusal to accept the certificate as

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[12] The record leading up to the Commissioner's August 1990 withdrawal decision shows Twin City's private passenger auto business in New Jersey earned, by its *own* economic analyses and assumptions, profits of at least 4.6% in 1987, 4.8% in 1988, and 5.4% in 1989. Further, Twin City took advantage of State-sanctioned flex rate increases of 5.7% in 1990, 6.3% in 1991 and 2.9% in 1992. Moreover, the State contests the business losses alleged by petitioners, and presented affidavits in the State court proceedings questioning petitioners' then-current calculations. Those affidavits, which are part of the record below, will be furnished to the Court in a supplemental appendix in the event the petition is granted.

[13] Twin City was granted by the Insurance Department a "prior approval" rate increase of 14.4% for its private passenger automobile lines effective August 1, 1988. (Pet.A-78).

[14] The record below indicates that some 32 automobile insurers sought at that time to withdraw from New Jersey. 609 A.2d at 1257. (Pet.A-82). Only a few of those companies ultimately pursued plans of withdrawal with the Department of Insurance, which is no doubt attributable in part to the salutary deterrent effects of the *Twin City* decision. 609 A.2d at 1259-60.

tendered, Twin City immediately sent nonrenewal notices to more than 3,000 of its policyholders and notified its network of 150 agent producers of its intent to withdraw. Only after the Commissioner obtained injunctive relief against Twin City (Resp.A-1 to A-11) were the notices rescinded and a plan for orderly withdrawal submitted consistent with the new statute for the Commissioner's review.

Twin City's proposed withdrawal plan was remarkably selective. In particular, Twin City sought to withdraw *only* from the New Jersey private passenger insurance business and retain authority to transact business in all other lines, including its *commercial* policies. As submitted, the plan also proposed that Twin City's affiliates all retain their New Jersey licenses, thus enabling them to continue reaping the profits of other lucrative property/casualty lines, including Hartford Underwriters' cherished endorsement to insure drivers through the AARP. Also, unlike certain other carriers that had requested the State's approval to withdraw from New Jersey as part of a nationwide corporate program to stop writing automobile insurance altogether, petitioners' intended withdrawal was confined to New Jersey.

C. The Decisions Below

On August 14, 1990, respondent State Insurance Commissioner Samuel Fortunato approved, with modifications, Twin City's withdrawal plan in a 35-page Administrative Decision and Order. (Pet.A-71). In his detailed decision, the Commissioner found that the "New Jersey private passenger automobile insurance market is presently undergoing a period of transition and adjustment in the wake of the enactment of the FAIR Act . . . [.]" (Pet.A-78). To avoid destabilization of that volatile market, the Commissioner determined in his regulatory judgment that Twin City's pullout must not be hasty, disruptive or selective (Pet.A-79, A-82). Accordingly, he imposed several conditions, including the surrender of its affiliates' certificates of authority pursuant to Section 72 of the FAIR Act and a mandate that Twin City satisfy its statutory obligations to write new business and absorb residual

market depopulation quotas until its withdrawal is complete (Pet.A-95). Twin City filed an accelerated appeal, declining to take advantage of the Commissioner's invitation that it request a hearing on any material factual issues it may have disputed. (Pet.A-97).[15]

On June 11, 1991, the Superior Court, Appellate Division unanimously affirmed the Commissioner's Decision and the underlying constitutionality and validity of Section 72 of the FAIR Act on its face and as applied to Twin City. 591 A.2d 1005 (N.J. App. Div. 1991). In its opinion, the Appellate Division specifically rejected Twin City's challenges to the withdrawal order under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, finding that the Commissioner's protective effort to adjust "the benefits and burdens of economic life to promote the public good" in the highly regulated insurance industry did not amount to a compensable taking, *id.*, 591 A.2d at 1010, and that the mandated restrictions on Twin City's withdrawal rationally assured the continued service of "a real public need" for automobile insurance. *Id.*, 591 A.2d at 1016. The Appellate Division also dispensed with claims variously raised by ITT Hartford and an industry *amicus* group under the Equal Protection and Commerce Clauses, retroactivity principles, and assorted state-law[16] grounds.

Upon granting certification to Twin City and its affiliates, and entertaining the arguments of the parties and a host of industry *amici*, the New Jersey Supreme Court on July 29,

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[15] While the appeal was pending, the Commissioner modified his administrative order to limit, consistent with the withdrawal statute, the order's surrender provisions to those seven ITT Hartford affiliates that are admitted as property/casualty insurers under "Title 17" of the New Jersey insurance statutes, N.J. STAT. ANN. § 17:32-1 (West 1992), and not those solely authorized to write life/health insurance business under "Title 17B", N.J. STAT. ANN. § 17B:23-1 (West 1992). See 591 A.2d at 1017.

[16] As a procedural nuance, the Appellate Division did remand the matter to permit the Commissioner the opportunity to reexamine his order in light of general withdrawal regulations that he had adopted while petitioner's appeal was pending. 591 A.2d at 1018. The regulations codify factors expressed in the Commissioner's 1990 administrative order. (Resp.A-12).

1992 unanimously affirmed the facial validity of the withdrawal statute and its application by the Commissioner to Twin City and its ITT Hartford affiliates. 609 A.2d 1248 (N.J. 1992). After tracing the history and regulatory context of New Jersey's troubled insurance market leading up to the withdrawal order, the Supreme Court rejected, *seriatim*, all of petitioners' federal constitutional and state-law challenges. In particular, the State Supreme Court ruled that the withdrawal order's "new business" and "affiliate surrender" provisions easily satisfied due process norms, noting that enforcing Twin City's statutory obligations to continue to write new business and help depopulate the residual market pending the effective date of its withdrawal "is not only rational and fair but virtually required," *Id.*, 609 A.2d at 1259. The Court also ruled that the Commissioner's affiliate-surrender mandate[17] responsibly took into account the interdependence of Twin City and its corporate affiliates,[18] 609 A.2d at 1259. The Court found the surrender requirements "substantially advanced" legitimate and important state interests by generally discouraging withdrawals by automobile insurers in a "period of regulatory turmoil and uncertainty" and by inducing other multi-line carriers to remain in the State through making available to them the more lucrative business of

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[17] The Court acknowledged that Twin City and its affiliates had limited its attack in the Supreme Court on the withdrawal order's "forfeiture" provision to the Takings Clause, *see* 609 A.2d at 1257-58, but it nonetheless prudentially considered – and sustained – the constitutionality of that provision under substantive due process principles as well. *Id.* at 1259-60.

[18] Recognizing ITT Hartford's ultimate ownership and corporate control, the common agents and claims personnel serving its affiliates, and the advantageous reinsurance pooling arrangements within the ITT Hartford holding company system, the Supreme Court concluded that "Twin City's interrelationship with its affiliates is indisputably sufficient to justify a regulatory approach that treats them pragmatically as a single entity." 609 A.2d at 1259. Hence, "[w]hether Twin City and its affiliates operate as a division of a single corporation or as subsidiary corporations of an integrated insurance holding company, a responsible regulation could hardly ignore their common ownership and operational interdependence." *Id.* In light of these state court findings of corporate integration and interdependence, petitioners' continued attempts to portray Twin City and its ITT Hartford affiliates to this Court as detached corporate entities should not be given credence.

withdrawing auto insurers and their affiliates. *Id.*, 609 A.2d at 1259-1260. The Court also extensively analyzed and rejected, under established standards for regulatory takings as expressed in the opinions of this Court, petitioners' claims under the Takings Clause, noting that the "public interest advanced by the [withdrawal] regulation substantially outweighs its adverse effect" on petitioners, and did not impermissibly interfere with their "reasonable investment-backed expectations" in the pervasively-regulated State insurance industry. 609 A.2d at 1265. For related reasons, the Court also declared the "unconstitutional conditions" doctrine unavailing to petitioners. *Id.* at 1265-66. Finally, the Court found no merit in other constitutional claims raised by petitioners and the *amici* under the Equal Protection and Commerce Clauses. *Id.* at 1260-61.

SUMMARY OF ARGUMENT

Petitioners' constitutional challenges to the State's regulation of their intended withdrawal from New Jersey's problem-plagued automobile insurance market were fully considered and soundly rejected by the state appellate courts below, consistent with substantive Due Process and Takings Clause principles previously enunciated by this Court. As petitioners initially concede, their attacks on the State's withdrawal statute and its administrative enforcement are substantively measured under the Due Process Clause by the minimal "rational basis" test for economic regulation that this Court established decades ago, a deferential test that is especially appropriate in the realm of the States' exclusive oversight of the business of insurance. For the reasons detailed in the opinions below, the so-called "mandatory new business" and "forfeiture" conditions that the State imposed on petitioners' withdrawal easily satisfy that standard. Those measures are rationally designed to protect policyholders that must depend on continued automobile insurance coverage, and to abate the disruptive consequences of selective, precipitous, or cumulative withdrawals from the State's insurance market in a time of regulatory crisis while sweeping legislative reforms are

being implemented to address that crisis. The novel "right of exit" theories petitioners subsequently espouse in an effort to alter that constitutional analysis under settled Due Process precepts should not be entertained in this context.

Further, petitioners' claims that the State has unconstitutionally confiscated their property fail under this Court's established three-part test for analyzing non-physical regulatory takings. In particular, petitioners – who have enjoyed for years the benefits of the State's highly-regulated insurance market – are assured under state law the right to earn a fair return on their policies through the ratemaking process if they choose to remain, and there are no record findings below that they will suffer a "total deprivation" of the economically viable uses of their property if they choose to depart. Under New Jersey's long-standing licensure statutes and decisional law, petitioners could have no reasonable investment-backed expectations that they would have an unfettered right to withdraw selectively from the State insurance market on their own terms. Hence, their claims under the Takings Clause were properly denied. Lastly, in spite of petitioners' efforts to portray this case as indicative of some nationwide trend by State insurance regulators to impose onerous withdrawal conditions, there are no conflicts among the federal circuit or state appellate courts on such issues that the Court need address in this case.

REASONS FOR DENYING THE WRIT

I. This Court's Review Is Not Required Because The New Jersey Courts Properly Applied This Court's Well-Established "Rational Basis" Test for Economic Regulation In Determining That The Withdrawal Statute and The Commissioner's Order Satisfy Constitutional Principles of Substantive Due Process

Petitioners first complain that the withdrawal provisions of the FAIR Act and, in particular, the "forfeiture" and "mandatory new business" conditions that the Insurance Commissioner has imposed upon Twin City's withdrawal pursuant to the statute, violate norms of substantive due process under the

Fourteenth Amendment. These claims are without merit. The New Jersey statute and administrative order clearly are rationally designed to serve legitimate public interests in the special realm of state insurance regulation, and thus easily satisfy this Court's well-settled "rational basis" test for reviewing such economic regulation under the Due Process Clause.

A. As Petitioners Concede, The Deferential "Rational Basis" Test Governs Judicial Review of A State's Economic Regulation, Especially Concerning The Business of Insurance

In accordance with long-standing substantive due process precedents of this Court, if state economic regulation is supported by a conceivable rational basis in serving a legitimate public purpose, it will be sustained as constitutional. *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 82-84 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). The appropriateness of utilizing such a deferential standard of judicial review is underscored in the specific context of the regulation of insurance, "a business to which the government has long had a 'special relation'," *California State Auto Ass'n v. Maloney*, 341 U.S. 105, 109 (1951). Further, through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, Congress has expressly and uniquely reposed in the states the exclusive power to regulate the business of insurance.

Petitioners expressly, and rightly, concede (Pet.11)[19] that the "rational basis" test of substantive due process governs here, but quarrel with the state courts' analysis in applying that well-settled test. Such quarreling does not justify this Court's intervention, as the extensive reasoning of the New

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[19] Despite this initial concession, petitioners obliquely suggest in the body of their argument that some heightened scrutiny is appropriate where an asserted "right-of-exit" is involved, *see* Pet.10, n.10, a novel claim that, for the reasons shown, *infra*, at Point I(A)(2), is unavailing.

Jersey Supreme Court and Appellate Division amply demonstrates the important public purposes furthered by the withdrawal statute and its application to petitioners. Quite simply, the statute and the Commissioner's order protect New Jersey policyholders from the harm and disruption that would surely be caused if the insurance companies upon which those drivers have become dependent for legally-mandated coverage could unconditionally pull out of their state in a time of acute market instability.

1. The State Has Not Unconstitutionally Compelled Petitioners to Engage In A New Business

Petitioners erroneously contend that the State has forced them to write private passenger automobile insurance in New Jersey. (Pet.12-13). That is not so. To the contrary, the administrative order leaves ITT Hartford with the choice of *continuing* to serve New Jersey's private passenger auto market with an assured opportunity to earn reasonable profits *or* departing from the State altogether in a manner that minimizes disruption and enhances the market climate for those carriers that do remain. Unlike the case of *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583 (1926) upon which petitioners rely (Pet.10-12), the State here has not required a private enterprise to provide a service to the public that it had never before supplied.[20] Rather, the State has merely regulated the conditions under which a carrier may discontinue a line of business that it has already been providing of its own volition.[21]

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[20] *Cf. Hartford Accident & Indem. Co. v. Ingram*, 226 S.E.2d 498 (N.C. 1976) (declaring unconstitutional North Carolina statute that required all general liability insurers in State to *begin* offering medical malpractice coverage).

[21] Petitioners nevertheless point to *Frost* as authority for the proposition that this choice amounts to an unconstitutional condition. That argument is without merit.

The unconstitutional condition doctrine holds generally "that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. 1413, 1415 (1989). In

Nor does this case, as petitioners wrongly contend, implicate recent *dictum* of this Court in *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1529 (1992). In *Yee*, the Court noted in passing that the case under review, one involving the constitutionality of a rent control ordinance, would be different if it compelled a landlord to rent his property to a particular tenant "in perpetuity." However, here, as in *Yee*, no perpetual obligation has been imposed; the Commissioner's administrative order simply requires Twin City to remain in New Jersey for a transition period of up to five years, a period that Twin City itself can shorten by arranging a replacement carrier to absorb its automobile policyholders. (Pet.A-81).[22]

Frost, the Court held that a state could not condition the use of public highways by private businesses upon their acceptance of common carrier status. But *Frost* was decided in 1926, when "[d]irect imposition of such liability on a private carrier would have violated *then-prevailing doctrines of substantive due process. Cf. Lochner v. New York*, 198 U.S. 45, 56 (1905) (striking down a statute limiting bakers' work hours as violative of the Fourteenth Amendment)." Sullivan, *supra*, at 1430, n.52 (emphasis added). There is no analogous, modern constitutional right being infringed upon in this case, despite petitioners' novel argument that corporations enjoy a constitutionally protected "right of egress". See Point I(A)(2), *infra*, at 16-17.

Furthermore, even if petitioners could successfully argue that the choice presented them by the State of New Jersey implicated some constitutional right, such a finding would not be dispositive of the question of whether the State had imposed an unconstitutional condition. "[T]he doctrine of unconstitutional conditions does not mean that no conditions can ever be attached to the doing of business or the exercise of a conditional right . . . [.] The task of an adequate theory of unconstitutional conditions is to figure out which conditions may be attached to what privileges and why." Epstein, *Takings: Descent and Resurrection*, 1987 *Sup.Ct.Rev.* 1, 35.

[22] In any event, *Yee* – which sustained the rent control ordinance at issue under the Takings Clause – did not even reach the substantive due process issue, which had not been addressed by the lower courts in that case. 112 S.Ct. at 1531.

Further, there is no clash, as petitioners suggest (Pet.14 n.11), between the New York Court of Appeals' opinion in *Seawall v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), and the New Jersey state courts' disposition of *Twin City*. *Seawall* involved a physical taking occasioned by a unique city ordinance compelling owners of single-room-occupancy ("SRO") hotels to, among other things, rehabilitate all of their *vacant* units and offer them for rent *indefinitely*. The challenged statutory provisions would have served to "place[ ] petitioners in a business, force[ ] them to remain in that business and refuse[ ] to

2. Petitioners' Novel "Corporate Right of Egress" Theory Does Not Warrant This Court's Review Nor Negate The Rational Bases Sustaining The State's Regulation

Petitioners next fashion a novel theory asserting that businesses enjoy some exalted right of "egress" or "exit" from a State's borders. There is no such right, at least with respect to corporations such as ITT and its ITT Hartford insurance affiliates, that should alter conventional due process analysis of the kind of economic regulation at issue here.

While individual citizens no doubt enjoy the constitutional right to travel from state to state, this Court has not extended constitutional protection of such a personal right to corporations. *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly, the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of *personal liberty*") (emphasis added); *see also Shapiro v. Thompson*, 394 U.S. 629-30 (1969) ("the nature of our Federal Union and our constitutional concept of *personal liberty* united to require that *all citizens be free to travel* throughout the length and breadth of our land . . . ") (emphasis added); Rotunda & Nowak, *Treatise on Constitutional Law: Substance and Procedure* 2d, § 15.7 (1992) ("[t]he right to travel has a long history of recognition as a right to *personal mobility*") (emphasis added); *Tatem v. Wright*, 23 N.J.L. 429, 446 (Sup. Ct. 1852) (individual's protected right to travel under Privileges and Immunities

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allow them to ever cease doing [that] business." 542 N.E.2d at 1068 (citation omitted). Here, by contrast, Twin City and its affiliates are not required to dedicate their already-established business operations "indefinitely" to new uses, nor is this a physical takings case. See Point II, *supra*, at p. 24. Moreover, the absence of an adequate nexus between the city ordinance at issue in *Seawall* and that ordinance's professed goal of helping the homeless is markedly distinguishable from the strong nexus found by the state courts in *Twin City* between New Jersey's withdrawal regulations and the legitimate aims of protecting insured citizens from the dislocations directly caused by such withdrawals. But, even assuming, *arguendo*, the state courts' approaches in *Seawall* and *Twin City* cannot be reconciled, that isolated difference alone hardly warrants this Court's *certiorari* review.

Clause is founded on desire "to secure and perpetrate mutual friendship and intercourse among the people of the different states" and hence is inapplicable to corporations). Although petitioners cite some law review articles and other scattered authorities in advocating that businesses enjoy constitutional "exit rights", it is clear that this Court has yet to embrace the proposition, and respondent submits that this case is not the proper vehicle to consider such a doctrine without the benefit of further jurisprudential treatment in the federal and state courts.

Even if, however, this Court were to equate a natural person's right to travel with a business corporation's interest in entering or "exiting" a State, the existence of such a right should not alter the rational-basis analysis that supports New Jersey's regulation of withdrawing insurance companies. No higher scrutiny under the Due Process Clause is nor should be triggered merely because an asserted right of egress is implicated by economic regulation.[23]

3. Petitioners' Allegations of Punitive Intent Do Not Strip The State's Regulatory Measures of Their Rational Underpinnings

Alluding to press reports of statements of the Governor of New Jersey, petitioners argue that they are being unfairly "punished" for attempting to withdraw from the New Jersey automobile insurance market. Petitioners go on to accuse the New Jersey Supreme Court of, in effect, condoning the State's political oppression of insurance companies by using "[a]rtful

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[23] Petitioners cite (Pet.12 n.10) this Court's opinion in *Nordlinger v. Hahn*, 505 U.S. ___, 112 S.Ct. 2326, 2332 (1992) for the proposition that "the right to travel enjoys heightened scrutiny under the *Equal Protection Clause*." (Emphasis added). In fact, the Court determined that plaintiff in *Nordlinger* lacked standing to raise a right to travel issue and thus did not reach the question of the proper level of scrutiny such an issue requires. Moreover, *Nordlinger* and the right-to-travel cases it does cite, are all *Equal Protection* cases. Here, petitioners have not presented to this Court any constitutional claims that New Jersey violated their Equal Protection rights, apparently abandoning the Equal Protection arguments they unsuccessfully pressed in the state courts below. See 591 A.2d at 1016-17; 609 A.2d at 1260-61.

language" and "euphemisms" in the Court's opinion to sustain the withdrawal statute and the Commissioner's order as a valid exercise of police powers. (Pet.16-17).

Notwithstanding petitioners' assessment of the state judicial process, it remains clear that the withdrawal statute and the Commissioner's order – viewed objectively on their merits – have ample justification in the protection they afford New Jersey policyholders to satisfy the rational-basis test of constitutionality. The strong deterrent character of the State-imposed conditions on Twin City's withdrawal is eminently rational in the context of New Jersey's particularly turbulent automobile insurance market. As the Supreme Court aptly put it, "[i]n such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective." *Twin City*, 609 A.2d at 1259-60. Moreover, the "affiliate-surrender" and "new-business" conditions of withdrawal objected to by petitioners are fully consistent with the general withdrawal regulations that the State has adopted pursuant to the statute, disproving any notion that petitioners have been unfairly "singled out."[24] In sum, the State's protective regulatory measures at issue here were obviously not, as petitioners claim, founded upon "[a] bare desire 'to harm a politically unpopular group' " (Pet.16), and remain constitutionally valid.[25]

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[24] See N.J. Admin. Code 11:2-29.3(c) (Resp.A-19) and 11:2-29.5(a)(2) (Resp.A-30).

[25] The two cases cited by petitioners in support of their argument that they have been constitutionally discriminated against as a "politically unpopular group" are inapposite.

In *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court considered a legislative amendment "intended to prevent so-called 'hippies' and 'hippie communes' from participating in the [federal] food stamp program." Not surprisingly, the Court found the amendment "wholly without any rational basis," 413 U.S. at 538, and ruled that " '[a] purpose to discriminate against hippies cannot *in and of itself and without reference to [some independent] consideration in the public interest, justify the . . . amendment*,' " 413 U.S. at 534-35 (citation omitted; emphasis added). No matter whether insurance companies are as unpopular in the

B. The "Affiliate-Surrender" and "New Business" Conditions of the Withdrawal Order Have a Strong Rational Nexus to Valid Statutory Purposes

Exporting this Court's Takings Clause analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987) to a substantive-due-process context, petitioners argue that there must be a "nexus" between conditions imposed by the government and the regulatory purposes under which those conditions are imposed. (Pet.18). Assuming, *arguendo*, that the Court's "nexus" test in *Nollan* even applies to substantive due process analysis, the State Supreme Court correctly found that the "affiliate surrender" and "new business" facets of the Commissioner's order have such a nexus to the aims of the withdrawal statute.

As to the so-called "mandatory new-business" aspect of the administrative order, the plain language of New Jersey's withdrawal statute expressly declares that "[t]he certificate of authority of the company shall be deemed to *continue in effect* until the provisions of the approved [withdrawal] plan are carried out." N.J. STAT. ANN. § 17:33B-30 (West 1992). (Emphasis added)[26] Thus remaining a licensed New Jersey

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1990's as hippies were with some lawmakers in the early 1970's, petitioners can hardly contend that their alleged unpopularity was the sole motivation behind the FAIR Act. Indeed, the Supreme Court rejected similar claims by other insurers that the FAIR Act represents a legislative and gubernatorial effort to punish insurance companies in violation of the Constitution's Bill of Attainder Clause. *State Farm v. State*, 590 A.2d 191, 208-209 (1991).

The relevance of *Medora v. Colautti*, 602 F.2d 1149 (3d Cir. 1979), is equally elusive. There, the Third Circuit looked at a Pennsylvania welfare system barring "all aged, blind, or disabled persons from receiving general assistance, including those who are in fact needy under the Pennsylvania welfare code yet ineligible for benefits under the federal program." 602 F.2d at 1151. The court found that Pennsylvania's system did not rationally further any legitimate governmental interests. Here, by contrast, the State's regulatory actions have ample rational underpinnings.

[26] In this respect, New Jersey's withdrawal statute markedly differs from California's withdrawal provisions, which provide that a departing insurer surrender its certificate to do business as the first step of the withdrawal process, thereby

insurer by operation of law until its withdrawal is complete, Twin City continues to have the rights and obligations under state law held by all other licensed carriers. These obligations include general statutory directives for automobile insurers to write policies for all qualified applicants who meet pertinent underwriting criteria, see N.J. STAT. ANN. § 17:33B-15 (West 1992) ("take-all-comers" provision), and to satisfy regulatory quotas to depopulate the residual market as required by strict legislative deadlines, *see* N.J. STAT. ANN. § 17:33B-11 (West 1992) (depopulation). Fairly described, the order does not so much mandate "new" business as it does business-as-usual under the prevailing laws. As the State Supreme Court observed, the withdrawal order's "new-business condition" enforcing these obligations is not only eminently rational and fair, but "compelling":

> Viewed against the backdrop of New Jersey's chronic difficulties in assuring coverage for sub-standard private-passenger automobile insureds, the justification for imposing that [new business] condition on Twin City's right to withdraw is *not merely rational, it is compelling.* To the extent Twin City's contention addresses the obligation to renew existing policies during its five-year withdrawal process, that obligation is hardly an onerous one. As it withdraws over a five-year period, Twin city must either place its existing policies with other carriers or renew them in order that its insureds not be disadvantaged by its withdrawal. We sustained an analogous requirement in *Sheeran*, *supra*, 80 N.J. at 561, 404 A.2d 625, and entertain no doubt about its reasonableness or its validity.
>
> We are also convinced that due process is not offended by the Commissioner's requiring Twin City to comply, during its withdrawal period, with the Reform Act's mandate that the shift of insureds from the residual to the voluntary market be shared

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immediately altering the company's licensure status. *Cf. Travelers Indemnity Co. v. Gillespie*, 785 P.2d 500 (Cal. 1990).

> equitably by all insurers. . . . New Jersey's extraordinary difficulties with assigned-risk drivers, resulting in the JUA's staggering deficit, provoked the Reform Act's mandatory residual-market depopulation provisions. *State Farm, supra,* 124 N.J. at 41-42, 590 A.2d 191. Because the Act requires all insurers to participate equitably in the shift from the residual to the voluntary market, see N.J.S.A. 17:30E-14, *the Commissioner's imposition of that statutory obligation as a condition of Twin City's withdrawal is not only rational and fair but virtually required by the Act.* That an insurer who enjoyed profitable operations during the pre-Reform Act period could abandon entirely the remedial burdens imposed by the Act on all private-passenger insurers would be inequitable.

Id., 609 A.2d at 1258-59 (emphasis added).[27]

Petitioners also attempt to resurrect before this Court an argument they failed to assert, *see* 609 A.2d at 1259, before the State Supreme Court: that the "affiliate surrender" (or so-called "forfeiture") aspect of the withdrawal order lacks a rational nexus to valid public purposes and thus violate substantive due process norms. Again, the Supreme Court's analysis below succinctly refutes any such argument of irrationality:

> As the Commissioner's order observed, the withdrawal of any private-passenger insurers in the current difficult regulatory climate increases the burdens on those insurers who remain, burdens attributable to the more favorable regulatory conditions enjoyed by Twin City before the passage of the Reform Act. Other private-passenger insurers have also sought withdrawal, following Twin City's

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[27] The fact that Twin City's private passenger book of business has risen since the FAIR Act was adopted (see Pet.6 n.5, 18) is but a natural consequence of adhering to nondiscriminatory underwriting practices and short-term residual market depopulation responsibilities shared by other licensed New Jersey automobile insurers pursuant to that statute. If Twin City and other companies were permitted to shirk those responsibilities merely by filing withdrawal applications, the burdens would be compounded for those that remain and the market even further disrupted.

> example. In such a period of regulatory turmoil and uncertainty, nothing short of severe regulatory measures imposed on private-passenger insurers threatening to withdraw – in other words, strong medicine – would be effective. *If the forfeiture condition discourages withdrawal, a substantial State interest – retention of private-passenger insurers – will have been advanced. If it fails to discourage Twin City's withdrawal, the availability for acquisition of its affiliates' insurance business may operate as an inducement to other multi-line carriers to remain in New Jersey, thereby advancing an analogous and equally substantial State interest.*

609 A.2d at 1259-1260. (Emphasis added). Accordingly, the Supreme Court concluded that the affiliate-surrender provision would readily meet the *Nollan* "nexus" test (if it were applicable) by "substantially advancing the legitimate state interest sought to be achieved." *Id., quoting Nollan, supra,* 483 U.S. at 834 n.3.

Petitioners' argument to this Court (Pet.18) that the affiliate surrender provision is counterproductive because it forces ITT Hartford's affiliates to stop writing automobile insurance, including their valued AARP accounts, ignores the Commissioner's regulatory judgment that selective withdrawals that attempt to "skim the cream" of the market are more disruptive than the wholesale surrender of an integrated carrier's entire book of business. The exercise of such administrative expertise is entitled to judicial deference, *see, e.g., Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 108 (1983) (in finding that a decision by the Nuclear Regulatory Commission was neither arbitrary nor capricious, the Court relied in part on the fact that the Commission was operating within "its area of special expertise.")[28], especially in the highly regulated insurance arena.

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[28] *See also Environmental Protection Agency v. National Crushed Stone Association*, 449 U.S. 64 (1980); *Rybachek v. United States Environmental Protection Agency*, 904 F.2d 1276 (9th Cir. 1990).

Accordingly, the Commissioner's "judgment call" readily satisfies the minimum rationality standards of the Due Process Clause.[29]

II. The Courts Below Correctly Held That the State's Regulatory Action, Which Involves Neither A Physical Taking Nor the Total Deprivation of Petitioners' Property, Did Not Violate The Takings Clause Under Standards Previously Enunciated By This Court

Applying the controlling Fifth Amendment standards previously enunciated by this Court, the State appellate courts concluded that the State's regulation of petitioners' withdrawal from the automobile insurance market did not amount to a compensable taking of their property. That conclusion was properly reached, particularly in this context involving no physical taking and no finding of a total deprivation of the

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[29] Straining to find a wide-ranging jurisprudential reason for this Court to grant review, petitioners assert that New Jersey's regulation of withdrawing insurers poses "a national threat to economic liberty and free enterprise." (Pet.18). In support of this sweeping claim, petitioners note that two states, Maine and Massachusetts, also have regulatory provisions that deal with certain aspects of insurer withdrawals, while another state, Iowa, has adopted an administrative regulation purporting to require the withdrawal of financially-troubled insurers domesticated in Iowa from other states where they are losing money. (Pet.10, n.9). The Massachusetts withdrawal statute was constitutionally sustained over 15 years ago by that State's highest court, *see Maryland Casualty Co. v. Commissioner of Insurance*, 363 N.E.2d 1087 (Mass. 1977), in an opinion fully consistent with the analysis of the New Jersey courts in *Twin City*. The validity of the Maine law, meanwhile, is the subject of active litigation that primarily focuses on Maine's special formula for apportioning deficits in its residual market for worker's compensation insurance, and has not yet generated any appellate opinions that theoretically might offer any differing perspectives. Further, the Iowa regulation is a unique provision that was adopted in reaction to California's 1988 mandatory rollback of insurance rates, a measure that itself was ultimately invalidated, *Calfarm Insurance Co. v. Deukmejian*, 771 P.2d 1247 (Cal. 1989), by the California courts. *See* Commentary, "Iowa Official Challenges Conclusion About State Insurer Rate/Withdrawal Regulations," 10 Journal of Insurance Regulation 251 (1991). There is no evidence that the Iowa regulation has ever been enforced in its narrow insolvency context or tested in litigation.

These sporadic developments in a handful of states do not rise to the level of a national legal issue ripe for this Court's review.

beneficial or productive uses of petitioners' property, and does not warrant this Court's review.

A. The Courts Below Properly Found No Compensable Taking Caused By The State's Regulatory Actions Under This Court's Settled Three-Part Test In Cases Not Involving Physical Invasions Or Land

Traditionally this Court has approached claims of governmental confiscation under the Takings Clause of the Fifth Amendment with far less scrutiny when the alleged taking does not involve the physical invasion or arrogation of real property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also Keystone Coal v. DeBenedictis*, 480 U.S. 470 (1987) (restriction of mining on private land); *Agins v. Tiburon*, 447 U.S. 255 (1980) (rezoning of private residential property). This past Term, the Court reaffirmed in *Yee v. Escondido*, *supra*, 112 S.Ct. at 1528, and in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992), the greater constitutional burden on plaintiffs in "regulatory takings" cases not involving physical invasions or land. Since no physical invasion or taking of ITT Hartford's real property has occurred, petitioners' Takings Clause claims are properly analyzed under less stringent precepts of compensation.

The determination of whether a governmental regulation limits the use of private property to such a degree that it constitutes a "taking" is highly fact-specific. *Connolly v. Pension Benefit Guaranty Corp.*, 476 U.S. 211, 224 (1986) (holding that governmentally-imposed financial disincentives to withdraw from a pension plan do not effect an unconstitutional taking). This Court has identified three well-established factors relevant to such factual inquiries: (1) the character of the governmental action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations. *Id.* at 225. Given these factors, the courts below properly concluded that there has not been a taking for which compensation is due in this case.

The first "takings" factor, the character of the governmental action, weighs heavily in favor of sustaining the withdrawal statute and order. As noted, *supra* at p. 24, there has been no physical invasion or permanent appropriation of Twin City's assets for the State's own use. *See Connolly, supra*, 476 U.S. at 225. The withdrawal statute is an integral part of the New Jersey's comprehensive revision of its automobile insurance system. As such, it "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good" and therefore is not a "taking" requiring governmental compensation. *Id.* In this regard, the State Supreme Court aptly recognized below that the "forfeiture condition was a forceful but relevant regulatory measure imposed to advance the substantial State interest in discouraging Twin City's withdrawal from the private-passenger automobile market, as well as the State's interest in encouraging other multi-line carriers to continue in that market." *Twin City*, 609 A.2d at 1263.

The second factor, the economic impact of the regulation, requires an examination of both the degree of loss suffered and the provisions in the regulatory scheme that would mitigate the loss. *Connolly, supra*, 476 U.S. at 225-26. The asserted negative economic consequences of the Insurance Commissioner's application of New Jersey's withdrawal statute flow from petitioners' own choice to cancel Twin City's New Jersey private passenger lines. Moreover, if Twin City elects to remain in the New Jersey automobile insurance market, any diminution of future profits that it may experience by complying with the FAIR Act temporary surtaxes, assessments, and other obligations is not compensable. As this Court observed in *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim."

Third, the State's regulation of petitioners' withdrawal did not interfere with "reasonable investment-backed expectations." Petitioners are charged with knowledge of the traditional highly regulated nature of the insurance industry. *See California State Auto Ass'n v. Maloney, supra*, 341 U.S. at

109. Indeed, more than a decade before petitioners' attempted pullout of Twin City, the New Jersey Supreme Court held as a general matter that the State Insurance Commissioner had inherent authority to regulate the orderly withdrawal of insurers leaving the States. *Sheeran v. Nationwide Mut. Ins. Co.*, 404 A.2d 625 (N.J. 1979).[30] Thereafter, the Governor of New Jersey in 1987 expressly recommended in a conditional veto of certain insurance reform legislation that the State statutes be amended to expressly vest the Commissioner with the power to require withdrawing insurers to surrender their licenses to conduct other New Jersey business, thus providing, in the words of the Appellate Division, "fair warning" to petitioners' investors that the State might exercise such authority. *Twin City*, 591 A.2d at 1011. Further, petitioners' licenses to do business in New Jersey were always subject to annual renewal and conditioned on the Insurance Commissioner's long-standing statutory authority, dating back to at least 1958, to refuse to renew licenses where "such refusal will best protect the interests of the people of th[e] State[.]" N.J. STAT. ANN. § 17:32-2(d) (West 1992).

Although petitioners may have presumed that the State would not actually impose stringent conditions on their withdrawal from the New Jersey market, reasonable investment-backed expectations under the Takings Clause must amount to more than such a "unilateral expectation." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). *See also*

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[30] Foreshadowing the "surrender" aspects of the 1990 withdrawal statute, *Sheeran* endorsed the propriety of the State preventing selective withdrawals by insurers that "refuse to renew their existing policies [in compliance with statutory criteria] and yet retain the ability to insure in the future those customers whom they consider desirable." *Id.*, 404 A.2d at 629. As the Supreme Court then put it, "[s]uch an end run around the statutory scheme cannot be countenanced." *Ibid.* Likewise, the New York state courts recognized in 1978 an insurance regulator's right to take action against withdrawing carriers that selectively "seek to reap the benefits of doing business [in the State] while 'dumping' unprofitable automobile policies, or even all automobile policies, while retaining other presumably profitable areas of insurance coverage[.]" *People ex rel. Lewis v. Safeco Ins. Co.*, 414 N.Y.S.2d 823, 829 (Sup. Ct. 1978). The Commissioner's order at issue here enforces those very same principles.

Lucas v. South Carolina Coastal Council, supra, 505 U.S. at ___, 112 S.Ct. at 2899 ("by reason of the State's traditionally high degree of control over commercial dealings [an owner of personal property] ought to be aware of the possibility that new regulation might even render his property *economically worthless* (at least if the property's only economically productive use is sale or manufacture for sale)") (emphasis added) (citation omitted).

On the whole, the Court's established three-prong test for evaluating regulatory takings claims clearly vindicates New Jersey's withdrawal statute and the Commissioner's administrative order enforcing the statute. There is no reason for this Court to disturb that conclusion here.

B. There Are No Findings of Fact In This Record of A "Total Deprivation" of the Beneficial Uses of Petitioners' Property

Petitioners analogize their circumstances (Pet.A-21) to those presented by the landowner in *Lucas v. South Carolina Coastal Council, supra*, in advocating that New Jersey's economic regulation of their insurance licenses warrants more severe judicial scrutiny under the Takings Clause. However, in *Lucas*, the government's brief opposing the *certiorari* petition did not contest state court findings that there had been a "total deprivation of a beneficial use" of Mr. Lucas' beachfront property resulting from applying its building prohibitions to him. *Id.*, 112 S.Ct. at 2894, 2896. Here, by contrast, there is no concession by the State nor any findings of fact below that petitioners have similarly been "totally deprived" of the beneficial uses of their corporate property. The State Supreme Court presumed that "the surrender by Twin City's affiliates of their respective licenses would *not* necessarily result in the elimination of *all* commercial value inherent in the affiliates' New Jersey business operations, some aspects of which undoubtedly could be applied to business in other states," but declined to speculate on whether ITT Hartford would be able to recoup that loss fully by diverting its marketing efforts to other States. 609 A.2d at 1264 (emphasis added). Moreover, the Supreme Court noted that "[t]he record

does not indicate whether the [ITT Hartford] affiliates could sell or otherwise receive compensation from other insurers interested in succeeding to lines of business written [in New Jersey] by one or more of Twin City's affiliates." *Id.*

Respondent submits that petitioners have not established any "total" deprivation of their property resulting simply from the discontinuation of their affiliates' legal authority to do business in this State if they choose to proceed with Twin City's withdrawal; their capital investment in New Jersey can surely be diverted, at least to some degree, to other productive uses. Conversely, if petitioners choose to remain in New Jersey, state law assures them of a continued right to earn a fair rate of return from their insurance lines. N.J. STAT. ANN. § 17:33B-2(g); *State Farm v. State*, 590 A.2d 204 (1991). In either event, because there is no "total deprivation" here, the "categorical rule" of compensation triggered by total deprivations in physical invasion or real property cases would have no application here, even if the Court were inclined to change the law and treat regulatory taking cases not involving real property on a par with physical taking cases.

CONCLUSION

For all of the above reasons, as amplified in the detailed opinions of the New Jersey Supreme Court and Appellate Division, the State's public-interest regulation of petitioners' withdrawal from the New Jersey automobile insurance market does not violate constitutional principles of substantive due process and regulatory takings under this Court's established standards for reviewing such State economic measures. There are no broad-based conflicts of law among the lower courts that the Court need to resolve in this matter, one which arises in the distinctive context of the States' exclusive province to regulate the business of insurance. Accordingly, respondent

respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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- and -

MICHAEL PARISER
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Dated: December 28, 1992

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – MERCER COUNTY
DOCKET NO. C90-0201

JASPER J. JACKSON, Acting Commissioner, New Jersey Department of Insurance, Plaintiff, v. TWIN CITY FIRE INSURANCE COMPANY, an Indiana Corporation; HARTFORD FIRE INSURANCE COMPANY, A Connecticut Corporation; ITT HARTFORD GROUP, INC., a Connecticut Corporation; and DALE RAYMOND COMEY, President of Twin City Fire Insurance Company, Hartford Fire Insurance Company and ITT Hartford Group, Inc., Defendants.	Civil Action ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS (Filed March 15, 1990)

This matter having been opened to the Court pursuant to *R.* 4:52-1, upon the filing of a Verified Complaint by Jasper J. Jackson, Acting Commissioner of Insurance of the State of New Jersey (Douglas S. Eakeley, Acting Attorney General of New Jersey, for Plaintiff; Stephen P. Tasy, Deputy Attorney General, appearing) in the presence of Wesley S. Caldwell, III, Esq., attorney for Defendants, Twin City Fire Insurance Company, Hartford Fire Insurance Company, ITT Hartford Group, Inc.; and

IT APPEARING to the Court from the Verified Complaint and Affidavit filed in this matter that Defendant Twin City Fire Insurance Company ("Twin City") through its parent companies, Defendants Hartford Fire Insurance Company and ITT Hartford Group, Inc; and their President, Dale Raymond Comey, attempted to surrender its Certificate of Authority to write private passenger automobile insurance in the State of New Jersey; and

IT FURTHER APPEARING that Defendants issued a notice to Twin City's New Jersey insurance producers advising said producers of Twin City's intent to withdraw from the private passenger automobile insurance market in the State of New Jersey; and

IT FURTHER APPEARING that Defendants' actions were in violation of the law of New Jersey governing the orderly withdrawal of foreign insurers from New Jersey insurance markets, *N.J.S.A.* 17:32-13, as revised by the Fair Automobile Insurance Reform Act of 1990, and for good cause shown;

IT IS, on this 15th day of March, 1990;

1. ORDERED that Defendants are temporarily restrained until the return date of this order to show cause or other order of the court from:

a. Surrendering defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

b. Discontinuing the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

c. Discontinuing the renewals by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive

approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

d. Attempting, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

e. Defendants shall immediately rescind the March 8, 1990 letter notifying Twin City's New Jersey insurance producers of its intent to withdraw from the New Jersey markets.

2. ORDERED further, that defendants show cause before the Superior Court of New Jersey, Chancery Division, on the 29th day of March, 1990 at 9:00 a.m. or as soon thereafter as counsel may be heard, why an Order providing for an interlocutory injunction should not be entered against defendants to be effective during the pendency of this suit, and until final hearing and entry of judgment, as follows:

a. Enjoining defendants from surrendering defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

b. Enjoining defendants from discontinuing the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

c. Enjoining defendants from discontinuing the renewal, by Twin City and those acting on Twin City's beahlf [sic] of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from

the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fiar [sic] Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

d. Enjoining defendants from attempting, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

e. Requiring defendants if they seek to withdraw as aforesaid to submit to the Commissioner of Insurance, for his approval, a plan for the orderly withdrawal of Twin City from the New Jersey private passenger automobile insurance and property/casualty markets, as mandated by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

f. Requiring defendants if they seek to withdraw as aforesaid to fully implement and comply with the plan of withdrawal approved by the Commissioner of Insurance, as mandated by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13;

g. Requiring defendants to rescind the March 8, 1990 letter notifying Twin City's New Jersey insurance

producers of its intent to withdraw from the New Jersey insurance markets.

3. ORDERED that this Order to Show Cause shall constitute process, and that defendants shall serve and file their answer upon plaintiff's attorney and the Clerk of the Court as provided by the Rules of this Court within 20 days from the date, hereof and if defendants fail to so serve and file their answer judgment by default may be rendered against them for the relief demanded in the Verified Complaint.

4. Briefs shall be filed with the Court no later than 3 days before the return date hereof.

/s/ Samuel D. Lenox Jr.
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - MERCER COUNTY
DOCKET NO. C90-0037

JASPER J. JACKSON, Acting Commissioner, New Jersey Department of Insurance, Plaintiff, v. TWIN CITY FIRE INSURANCE COMPANY, an Indiana Corporation; HARTFORD FIRE INSURANCE COMPANY, A Connecticut Corporation; ITT HARTFORD GROUP, INC., a Connecticut Corporation; and DALE RAYMOND COMEY, President of Twin City Fire Insurance Company, Hartford Fire Insurance Company and ITT Hartford Group, Inc., Defendants.	Civil Action ORDER GRANTING PRELIMINARY INJUNCTION (Filed April 17, 1990)

This matter having been opened to the Court pursuant to *R.* 4:52-1, upon the filing of a Complaint by Jasper J. Jackson, Acting Commissioner of Insurance of the State of New Jersey (Douglas S. Eakeley, Acting Attorney General of New Jersey, Attorney for Plaintiff; Stephen P. Tasy, Deputy Attorney General, appearing) in the presence of Wesley S. Caldwell, III, Esq., attorney for defendants, Twin City Fire Insurance Company, Hartford Fire Insurance Company, ITT Hartford Group, Inc.; and

The Plaintiff Jasper Jackson, Acting Commissioner of the New Jersey Department of Insurance, having applied to this Court for a preliminary injunction against defendants, and

The Court having considered the submissions and arguments of the parties, and for good cause shown;

IT IS on this 17th day of April, 1990;

ORDERED that defendants are hereby preliminarily enjoined as follows:

a. Defendants shall not surrender defendant Twin City's Certificate of Authority to write private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with, and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.*

17:32-13, or until a contrary order is granted by the Final Judgment in this matter.

b. Defendants shall immediately continue the writing, by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey, until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for orderly withdrawal of Twin City from the New Jersey automobile insurance and property/casualty markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13 or until a contrary order is granted by the Final Judgment in this matter;

c. Defendants shall continue the renewal by Twin City, and those acting on Twin City's behalf, of private passenger automobile insurance and other lines of insurance in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from the New Jersey automobile insurance market, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13; or until a contrary order is granted by the Final Judgment in this matter;

d. Defendants shall not attempt, in any manner or form, to effectuate the withdrawal of Twin City from the private passenger automobile insurance and property/

casualty markets in New Jersey until such time as defendants file with and receive approval for, from the Commissioner of the New Jersey Department of Insurance, a plan for the orderly withdrawal of Twin City from those markets, and until such time as defendants fully comply with the implementation of the approved plan of withdrawal, as required by The Fair Automobile Insurance Reform Act of 1990, *N.J.S.A.* 17:32-13; or until a contrary order is granted by the Final Judgment in this matter.

/s/ Hon. Paul G. Levy
Hon. Paul G. Levy, J.S.C.

N.J. Admin. Code §§ 11:2-29.1 *et seq.* (effective May 20, 1991).

SUBCHAPTER 29. ORDERLY WITHDRAWAL OF INSURANCE BUSINESS

Authority

N.J.S.A. 17:1-8.1, 17:1C-6(e), 17:17-10 and 17:33B-30 (P.L. 1990. c.8. sections 71 and 72 and 52:14B-1 et seq.)

Source and Effective Date

R. 1991 d.262, effective May 20, 1991.
See: 23 N.J.R. 15(b), 23 N.J.R. 1673(a).

11:2-29.1 Purpose and scope

(a) The purpose of this subchapter is to establish the requirements and procedures by which insurers may undertake an orderly withdrawal from the business of insurance in this State, thereby minimizing the adverse effects upon policyholders of eliminating coverage; preventing or minimizing the disruption in the marketplace and harm to the public that would otherwise occur in the absence of regulation; and permitting insurers to wind down their business in an orderly fashion as is consistent with N.J.S.A. 17:17-10 and 17:33B-30.

(b) This subchapter applies to all insurers that seek to withdraw from the business of insurance as defined herein.

11:2-29.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Affiliate" means an insurer that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the insurer that initiates a withdrawal, as defined in N.J.S.A. 17:27A-1.

"Annual statement" means the form of statement that is described in N.J.S.A. 17:23-1.

"Applicant" means the insurer seeking approval to withdraw from the business of insurance in this State.

"Assumption agreement" means a contract between insurers whereby one insurer transfers all or substantially all its rights, duties and obligations arising from certain policies to another insurer.

"Authority" means the power granted by the Commissioner which enables an insurer to transact the business of insurance.

"Automobile" and "automobile insurance" are as defined in N.J.S.A. 17:30E-3.

"Business of insurance" or "insurance" means any kind, line, subline, or a portion thereof authorized by Chapters 17 or 32 of Title 17 of the Revised Statutes.

"Commencement date" of withdrawal means the date which the applicant may begin withdrawing from this State pursuant to the approved plan of orderly withdrawal.

"Commissioner" means the Commissioner of the New Jersey Department of Insurance.

"Control" is as defined in N.J.S.A. 17:27A-1.

"Department" means the New Jersey Department of Insurance.

"Effective date" of withdrawal means the date at which the applicant has complied with any and all conditions contained in the approved plan of orderly withdrawal.

"Insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer as defined in N.J.S.A. 17:27A-1.

"Insurance producer" or "producer" means any person engaged in the business of an insurance agent, broker or consultant, as those terms are defined in N.J.S.A. 17:22A-2.

"Insurer" means an insurer or eligible surplus lines insurer, and any insurance affiliates thereof, authorized or admitted pursuant to Chapters 17 or 32 of Title 17 of the Revised Statutes to transact in this State the business of insurance as defined herein.

Multi-state account" means a single contract or policy of commercial lines insurance as defined in N.J.S.A. 17:29AA-3 which covers risks or locations in both New Jersey and at least one other state; any group policy in which covered members of the group reside in New Jersey and at least one other state; and any plan approved for the mass marketing of insurance pursuant to N.J.A.C. 11:2-12 in which policyholders of the plan reside in New Jersey and at least one other state.

"Plan" means a plan of orderly withdrawal from insurance business in New Jersey.

"Portfolio reinsurance agreement" means a contract between insurers whereby one insurer transfers its entire liability for in-force policies or outstanding losses, or both, to another insurer regarding a described segment of insurance business.

"Rating system" means every schedule, class, classification, rule, guide, standard, manual, table or rating plan by whatever name described containing the rates, rules and forms used by any insurer or by any rating organization in determining or ascertaining a rate.

"Reinsurance agreement" means a contract between insurers whereby one insurer agrees to insure part of all of an insurance risk of an originating, or ceding, insurer.

"Residual market mechanism" means any program authorized or created by the New Jersey State Legislature which is designed to provide an insurance market for insureds who are unable to obtain insurance in the voluntary market.

"State" means the State of New Jersey.

"Withdraw" or "withdrawal" means the nonrenewal, cancellation, or termination of policies, or surrender of authority to transact the business of insurance in this State, or any insurer action that is equivalent to a withdrawal from the business of insurance in this State which may include, but is not limited to, the elimination of a rating system, termination of agency contracts, reduction in agency commissions, restrictions on agency solicitation or binding authority, insurer refusal of applications or

declaration of a dividend to an affiliate, when such action or actions exceed those occurring in the ordinary course of business. Whether the above activities are equivalent to a withdrawal shall be determined by the Commissioner on a case-by-case basis.

"Withdraw" or "withdrawal" also means the transfer to another insurer of insurance business pursuant to an assumption agreement as defined herein or a portfolio reinsurance agreement as defined herein.

11:2-29.3 General provisions

(a) Any insurer that seeks to undertake any of the actions described as withdrawals in N.J.A.C. 11:2-29.2 shall provide the Commissioner with written notification so that he or she may determine whether the insurer must file a plan of orderly withdrawal pursuant to N.J.A.C. 11:2-29.4 or, if such plan is waived by the Commissioner under circumstances he or she considers appropriate, a reasonable substitute withdrawal procedure approved by the Commissioner.

(b) Any insurer that is required by the Commissioner to file a plan of orderly withdrawal pursuant to N.J.A.C. 11:2-29.4 shall submit to the Department an original and five copies of a proposed plan for prior approval thereof.

1. The Commissioner shall not begin his or her evaluation of the proposed plan until the applicant has complied with the requirements contained herein for its submission, including the submission of any additional information specifically required pursuant to N.J.A.C.

11:2-29.4(b), after which the Commissioner shall approve the plan within 120 days, subject to the terms and conditions which he or she may consider appropriate.

i. The Commissioner shall acknowledge to the applicant the receipt of any filing and request any additional information required for review pursuant to N.J.A.C. 11:2-29.4(b) within 30 days thereafter, the failure of which shall allow the applicant to treat the filing as complete.

ii. The Commissioner may extend the 120 day time frame for approval of the plan an additional 40 days for good cause and shall provide notice to the applicant of such extension.

2. An applicant shall not commence any action in furtherance of a withdrawal as defined herein prior to the Commissioner's approval thereof. For the purposes of this paragraph, commencing an action in furtherance of a withdrawal does not include the non-binding oral or written communication between an insurer/applicant and another insurer in negotiating a replacement of the insurer/applicant's insurance business by the other insurer, the negotiation of an agreement with a replacement carrier subject to approval of the Commissioner and conditioned on approval of the plan, or non-binding oral or written communications with any of the entities set forth at N.J.A.C. 11:2-29.4(a)11.

3. The authority of an applicant to conduct the business of insurance from which it seeks to withdraw, as well as any other authority which it is required to surrender pursuant to this subchapter shall, upon approval of

the plan, continue in effect, but only in accordance with the plan as approved.

4. No withdrawal shall become effective until the applicant has complied with any and all conditions contained in the approved plan which relate to the effective date of withdrawal.

5. Unless the applicant specifically requests and is granted a waiver, the applicant shall make either or both of the following special deposits, as a condition of approval of the plan, in securities or the equivalent thereof in performance bonds as determined by the Commissioner, until such time as the applicant's liabilities as determined by the Commissioner no longer exist in this State:

i. A deposit established with and in the name of the Commissioner for the benefit of all of the applicant's New Jersey policyholders, claimants and creditors which shall be equal to an amount not to exceed 125 percent of the applicant's current and potential liabilities existing or that may exist in this State;

ii. A deposit established with and in the name of the Commissioner pursuant to a consent order signed by the applicant to guarantee compliance with the approved plan, a material breach of which may, upon notice to the insurer, result in an immediate forfeiture of the deposit in whole or in part. This deposit shall be in an amount established at the discretion of the Commissioner and may equal the greater of one million dollars or 10 percent of the applicant's average annual net direct premiums written within the last three years in the line(s) from which it seeks to withdraw.

6. The applicant may substitute, with the approval of the Commissioner, in place of the deposits required in (b)5i above, the following:

i. A proper guarantee from its immediate or ultimate parent;

ii. A letter of credit;

iii. A trust agreement; or

iv. Any other financial guarantee of the applicant's total liabilities.

7. For good cause shown, the Commissioner may waive the special deposits or substitutes required in (b)5 and 6 above upon an consideration of factors including, but not limited to, the uniqueness of the applicant's circumstances, its size, and its volume of business and whether the withdrawal is being effected pursuant to an assumption or portfolio reinsurance agreement.

(c) The Commissioner may require as a condition of approval of the plan the surrender of some or all certificates of authority, issued pursuant to Chapters 17 or 32 of Title 17 of the Revised Statutes, held by the applicant or by other companies within the same insurance holding company system as the applicant for amendment, termination, suspension, restriction or such other modification as the Commissioner considers appropriate. Upon specific request by the applicant for a waiver of any portion of these requirements the Commissioner may grant the waiver in whole or in part if the Commissioner finds that, based upon proofs presented, one or more of the following mitigating circumstances exist:

1. The withdrawal will not cause a market availability problem or an undue disruption in the marketplace;

2. The applicant will enter into an agreement with a proposed replacement carrier to assume the applicant's existing book of business conditioned, however, upon an approved plan;

3. The withdrawal will not adversely affect competition;

4. The withdrawal is due to specified problems affecting the solvency of the applicant;

5. The withdrawal is consistent with the insurer's overall plan of withdrawal in other jurisdictions as part of a corporate restructuring; or

6. The public interest is best served by such a waiver.

(d) If more than one insurer within the same holding company system seeks or is required by the Commissioner pursuant to this subchapter to withdraw from the business of insurance in this State, each withdrawing affiliate shall submit a separate plan to the Commissioner pursuant to this subchapter or, if such plan is waived pursuant to (a) above, a reasonable substitute withdrawal procedure approved by the Commissioner.

(e) An insurer that currently services a residual market mechanism and is subject to the withdrawal provisions contained in the plan of operation governing such mechanism is exempted from the requirements of this subchapter to the extent of the insurance business serviced by the insurer in such mechanism.

(f) The applicant and its affiliates shall be prohibited for a period of up to five years after the effective date of withdrawal from acquiring, directly or indirectly, a controlling interest in any insurer that is licensed to do business in this State without approval of the Commissioner.

11:2-29.4 Elements of proposed plan of orderly withdrawal

(a) A proposed plan of orderly withdrawal shall contain the following information supported by adequate proof of the validity thereof, if not specifically required herein:

1. The reasons the applicant seeks to withdraw, supported by a description and documentation of the applicant's financial condition for the last three years or such other period as the Commissioner considers appropriate, including the underlying accounting, actuarial and other relevant data or material relied upon in deciding to seek withdrawal;

2. The proposed commencement date of such withdrawal;

3. A description of the following:

i. All authority currently and previously held by the applicant in all jurisdictions (specifically listing states in which the applicant has withdrawn);

ii. The authority in New Jersey currently and previously held by its insurer affiliates, including dates of issuance, surrender, suspension or revocation; and

iii. The authority in other jurisdictions held by the applicant or its insurer affiliates that has recently been surrendered or is intended for surrender currently and in the future;

4. An organizational chart and narrative description of the relationships among the applicant and its insurer affiliates, if any, indicating at a minimum:

i. The business of insurance which each has authority to write in New Jersey;

ii. The management relationships;

iii. The financial relationships (for example, reinsurance agreements, pooling arrangements, common investments, etc.);

iv. The marketing relationships;

v. The agency relationships;

vi. The claims handling relationships; and

vii. Whether any of the applicant's insurer affiliates are also taking action or applying to withdraw from the business of insurance in this State (and if so, the details thereof);

5. A description, by line of insurance written in New Jersey, of the applicant's and its insurer affiliates' business (both property/casualty and life, health) during the last three years, including for each year the corresponding premium volume, number of current policyholders, number of exposures, approximate market share and the number of insurance producers and employees servicing the business. If employees of the

applicant or any of its affiliates will be terminated in this State as a result of the applicant's withdrawal, a description of the method of termination, a description of the termination benefits and any other financial or nonfinancial accommodations made on the employees' behalf shall be included;

6. The address of each of the applicant's offices in this State;

7. Copies of the proposed cancellation and nonrenewal notices, and termination notices, the applicant intends to send to its policyholders and insurance producers, respectively, as well as any other withdrawal-related correspondence, including the proposed dates of such notices or correspondence. Producer termination notices shall comply with the requirements contained in N.J.S.A. 17:22-6.14a;

8. In the case of a proposed withdrawal of life, health or annuity business to be affected through one or more assumption agreements, the proposed certificate(s) of assumption and letters of notification (where appropriate) to policyholders informing them of the transfer of their policies to another insurer. In the case of a proposed withdrawal of other than life, health or annuity business to be effected through one or more portfolio reinsurance agreements, the reinsurance agreement(s) and letters of notification (where appropriate) to policyholders informing them of the reinsurance of their risks with another insurer;

9. The name and address of each insurance producer, as well as the number of policies sold and premium volume produced by each producer, by the line of

insurance, for a 12 month period prior to the filing of the proposed plan;

10. A specimen copy of each current producer contract;

11. Copies of all correspondence and notices to be sent to the following entities or their statutory successors, as well as a description of all agreements (which need not be in final form) reached with such entities or their statutory successors as to the applicant's financial and reporting obligations to them, as applicable; if not applicable, an explanation why. The following list is not intended to be exhaustive. It is the responsibility of the applicant to furnish the information required under this paragraph for any other statutorily created or authorized entity to which it owes or may owe a financial or reporting obligation. The Commissioner may require the applicant to deposit with any of the below-listed entities (or their statutory successors) an amount sufficient to meet the applicant's obligations thereto.

i. The Unsatisfied Claim and Judgment Fund established pursuant to N.J.S.A. 39:6-61 et seq.;

ii. The New Jersey Property-Liability Insurance Guaranty Association established pursuant to N.J.S.A. 17:30A-1 et seq.;

iii. The New Jersey Automobile Insurance Risk Exchange established pursuant to N.J.S.A. 39:6A-21 through 22.1;

iv. The Mutual Workers Compensation Security Fund establish[illegible] pursuant to N.J.S.A. 34:15-112;

v. The Stock Workers Compensation Security Fund established pursuant to N.J.S.A. 34:15-105;

vi. The New Jersey Insurance Division of Fraud Prevention established pursuant to N.J.S.A. 17:33A-1 et seq.;

vii. The Commercial Automobile Insurance Procedure established pursuant to N.J.S.A. 17:29D-1;

viii. The New Jersey State Division of Taxation for premium taxes required by N.J.S.A. 54:18A-1 et seq. and 17:33B-49;

ix. The Surplus Lines Guaranty Association established pursuant to N.J.S.A. 17:22-6.70 et seq.;

x. The Medical Malpractice Reinsurance Association established pursuant to N.J.S.A. 17:30D-1 et seq.;

xi. The Market Transition Facility established pursuant to N.J.S.A. 17:33B-11;

xii. The New Jersey Automobile Full Insurance Underwriting Association for examination assessments provided by N.J.S.A. 17:30E-18.1;

xiii. The New Jersey Automobile Full Insurance Underwriting Association for residual market equalization charges and policy constants established pursuant to N.J.S.A. 17:30E-8 and 17:29A-37.1, respectively; and

xiv. The Department of Insurance for examination fees provided for by N.J.S.A. 17:23-1 et seq. and other statutory fees provided for by N.J.S.A. 17:33-1;

12. A statement, by line of insurance written in this State, of all of the applicant's current incurred liabilities and reserves, including those incurred but not reported, as developed and certified by a "qualified actuary" as defined in N.J.A.C. 11:1-21.1 for property and casualty lines and by a Fellow of the Society of Actuaries for life and health lines, as of a date not earlier than 90 days prior to the submission of the proposed plan and which shall include the following in the case of insurance other than life:

i. Copies of all work papers of the actuary supporting the actuarial opinions;

ii. Copies of all underlying statistics used by the actuary;

iii. If not included in (b)12ii above, development triangles, New Jersey only and countrywide for the following. Triangles shall be constructed as of December 31 for as many accident years and as many development years as necessary to display at least five mature accident years. For the purpose of this requirement, a mature accident year is defined as one for which paid losses equal at least 99 percent of incurred losses including IBNR. Such data shall be supplied both in hard copy and as their ASCII equivalent. Any narrative necessary for proper interpretation of the data supplied shall be provided.

(1) Paid losses;

(2) Incurred losses; and

(3) Claim counts;

(A) Reported; and
(B) Close; and

iv. If the insurer does not have five mature accident years as required in (b)12iii above, then it shall display five accident years which are the closest to being mature, and if the insurer does not have five accident years of data, then it shall display the accident years it has.

13. A description of the manner in which the applicant has in the past three years handled and intends to handle claims, premium factor charges, premium billing, and policyholder service regarding policies held by New Jersey residents remaining in force after the plan has been approved. Provide a description of the applicant's staff and adjusters servicing these claims, including the servicing location and the procedures for consumer contact;

14. A list of all the applicant's and its affiliates' deposits, if any, currently held pursuant to N.J.S.A. 17:20-1 et seq.;

15. A description of the kind and amount of all reinsurance assumed and ceded by the applicant, identifying each ceding and assuming insurer and describing the corresponding risks in each reinsurance agreement. An explanation of whether the proposed withdrawal will affect the surplus of another insurer as a result of the loss of credit received by that insurer on any of the applicant's assumed reinsurance, as well as a description of the procedures designed to minimize any marketplace disruption or hazardous financial condition that may occur as a result of the loss of credit, shall be included;

16. A description of all multi-state accounts under which insurance has been provided for risks located in New Jersey, as well as an explanation of the impact of withdrawal on such risks;

17. The proposed amount of the special deposits required under N.J.A.C. 11:2-29.3(b)5, which shall be maintained until such time as the applicant's liabilities and potential liabilities no longer exist in this State;

18. Written certification from a duly authorized officer of the applicant, signed under the pains and penalties of perjury, that the information submitted in the proposed plan is accurate and complete to the best of his or her belief and that for as long as insurance policies are in force or there are unpaid losses or expenses in this State;

i. The applicant shall fully honor all of its legal obligations in this State;

ii. The applicant shall continue to service, without discrimination, all outstanding policies, bonds and surety obligations, which includes processing all usual and customary endorsements requested by insureds during the term of such policies, subject to the applicant's normal underwriting standards;

iii. The applicant shall continue to submit annual statements and information required by the entities set forth in (a)11 above, upon request, for as long as the applicant has any unearned premium or any unpaid or incurred losses in this State;

iv. The applicant shall continue to operate in accordance with the laws and regulations of this State and remain subject to examination by the Department for as long as considered necessary by the Commissioner;

v. The applicant shall not accept any new business whatsoever in this State unless authorized or required by the Commissioner, including reinsurance and excess or surplus lines placements; and

vi. The applicant shall maintain its designation of the Commissioner as its agent for service of process; and

19. The plan shall include a method acceptable to the Commissioner to verify the applicant's compliance with its obligations under the plan as approved which may include, but is not limited to, quarterly financial and informational reports of the applicant's progress under the plan.

(b) The Commissioner may require any other information he or she considers relevant to the evaluation of the request to withdraw.

11:2-29.5 Replacement; non-renewal

(a) Notwithstanding the provisions of N.J.A.C 11:3-8.3, if an applicant's request to withdraw involves private passenger automobile insurance and the applicant is required to submit a proposed plan, the applicant is subject to the following additional conditions which must be addressed in the proposed plan:

1. The applicant shall seek to place its business with a voluntary market replacement carrier or carriers

acceptable to the Commissioner for a specified period of years after the Commissioner's approval of the plan or until all automobile insurance is replaced, whichever is sooner.

i. The period of time in which an applicant must seek to place its business with a replacement carrier will be determined by the Commissioner, but in no instance will it be less than one year or more than five years. If, at the end of the designated period, the applicant has not succeeded in placing all of its private passenger automobile insurance policies with a vountary [sic] market carrier, the applicant shall begin an orderly process of nonrenewal at a rate designated by the Commissioner. In accordance with such process, the applicant shall provide two notices of nonrenewal to remaining policyholders. Unless the Commissioner finds that good cause exists for shortening the initial notice period, the first nonrenewal notice shall be provided at least one year prior to the next policy expiration date and its contents shall comply with the provisions of N.J.A.C. 11:3-8.3. The insurer shall issue a second notice of nonrenewal in compliance with the time and content requirements of N.J.A.C. 11:3-8.3.

ii. An insurer which acts as a replacement carrier for the private passenger automobile insurance business from which the applicant seeks to withdraw assumes all of the legal rights, duties and obligations associated with the participation of private passenger automobile insurers in the automobile insurance market in this State.

2. An applicant shall be required to accept the quotas established by N.J.S.A. 17:33B-11(c)5 unless the applicant specifically requests and the Commissioner agrees to a waiver of this requirement.

(b) If an applicant's request to withdraw involves other than private passenger automobile insurance, the applicant may be subject to conditions addressed either in the approved plan or, if the plan is waived pursuant to N.J.A.C. 11:2-29.3(a), in a reasonable substitute withdrawal procedure approved by the Commissioner.

11:2-29.6 Confidentiality of plan of orderly withdrawal

(a) All data or information contained in the plan is confidential and will not be disclosed by the Department to any person other than its employees and representatives, except the following items, but only upon written, specified request and upon notice to the insurer/applicant:

1. N.J.A.C. 11:2-29.4(a)3i – Description of current and prior authority to do business by jurisdiction;

2. N.J.A.C. 11:2-29.4(a)4 – Organizational chart;

3. N.J.A.C. 11:2-29.4(a)4i – Lines of insurance written by each affiliate;

4. N.J.A.C. 11:2-29.4(a)4v – Agency relationships of affiliates by agent name, to the extent available through the Department's licensing system;

5. N.J.A.C. 11:2-29.4(a)5 – Premium volume, number of current policyholders, market share and number of producers by line of business;

6. N.J.A.C. 11:2-29.4(a)6 – Address of applicant's offices in this State;

7. N.J.A.C. 11:2-29.4(a)7 – Policyholder nonrenewal and producer termination notices;

8. N.J.A.C. 11:2-29.4(a)9 – Name and address of each insurance producer to the extent available through the Department's licensing system;

9. N.J.A.C. 11:2-29.4(a)11 – Copies of all correspondence and notices sent to various entities, as approved, to which the applicant owes a financial obligation;

10. N.J.A.C. 11:2-29.4(a)12 – Certified statement of New Jersey incurred liabilities and reserves;

11. N.J.A.C. 11:2-29.4(a)14 – Deposits held by a custodian on behalf of the Commissioner; and

12. N.J.A.C. 11:2-29.4(a)17 – Establishment of special deposits or equivalent performance bonds as approved.

11:2-29.7 Fines and penalties

Failure to comply with this subchapter may result in the imposition of sanctions by the Department including, but not limited to, sanctions pursuant to N.J.S.A. 17:33-2.

11:2-29.8 Severability

If any provision of this subchapter or its application to any person or circumstance is held invalid, such determination shall not affect other provisions or applications

of this subchapter which can be given effect without the invalid provision or application, and to that end the provisions of this subchapter are separable.